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Long Island Head Start Child Development Services, Inc. and District Council 1707, Local 95, American Federation of State, County and Municipal Employees, AFL–CIO. Case 29–CA–26343

September 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 22, 2005, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

The Respondent excepts to the judge's finding that it violated Section 8(a)(1) and (5) of the Act by unilaterally changing its health insurance carrier and plan on June 1, 2004.² The Respondent concedes that it changed the carrier and plan but contends that the parties' 1998-2001 collective-bargaining agreement,³ which agreement automatically renewed for successive 1-year periods, afforded the Respondent sole discretion to modify employee benefit plans.⁴ The Respondent asserts that, in the absence of timely written notice to terminate or modify that agreement, it automatically renewed after May 4,

and therefore permitted the Respondent's June 1 action. We find no merit in the Respondent's contentions.

First, the judge implicitly found, and we agree, that the parties' collective-bargaining agreement expired on May 4. In late 2003 and early 2004, the parties began negotiating for a successor collective-bargaining agreement. The Board has found that, by entering into negotiations for a new agreement, parties waive contractual requirements of timely or written notice of termination or modification, and the extant contract does not automatically renew. *Lou's Produce*, 308 NLRB 1194, 1200 fn.4 (1992); *Drew Div. of Ashland Chemical Co.*, 336 NLRB 477, 481 (2001); *Big Sky Locators, Inc.*, 344 NLRB No. 15 (2005). Accordingly, contrary to the Respondent's contention, the prior agreement did not automatically renew after the parties had begun bargaining for a new contract.

Second, we agree with the judge's further finding that the contractual reservation to the Respondent of sole discretion with respect to health benefits did not survive the expiration of the collective-bargaining agreement. A contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties' contrary intentions. *Ironton Publications*, 321 NLRB 1048, 1048 (1996); see also *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995) (reservation of management discretion does not survive contract unless the contract provides otherwise). There is no evidence in this record demonstrating that the parties intended that the agreement to permit the Respondent to make unilateral decisions with respect to health benefit plans would extend beyond the contract term.

Finally, although the parties' negotiations for a successor agreement resulted in a Memorandum of Agreement (MOA), reached on April 22, no party contends that the provisions of that agreement privileged the Respondent's unilateral action.

In all of these circumstances, we find that the Respondent's change of health benefit plans was not privileged.⁵ Therefore, we conclude, as did the judge, that the Respondent violated Section 8(a)(1) and (5) by unilaterally changing its health insurance carrier and plan.

¹ We shall modify the recommended Order to require the Respondent to notify and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. See *Mimbres Memorial Hospital*, 337 NLRB 998 fn. 2 (2002) (holding limited bargaining order appropriate to remedy unlawful unilateral change). We shall also substitute a new notice to conform to the Order as modified.

² All dates are 2004 unless otherwise indicated.

³ The agreement had an effective term of May 5, 1998, through May 4, 2001, and further provided that "[t]hereafter, it shall automatically renew itself and continue in full force and effect from year to year unless written notice of election to terminate or modify any provision of this Agreement is given by one party, and received by the other party not later than sixty (60) days prior to the expiration date of this Agreement or any extension thereof."

⁴ Art. 29 of the parties' agreement stated that the provisions of the personnel manual shall remain in effect except where modified by the agreement. Section 450 of the personnel manual reserved to the Respondent discretion to modify or terminate benefit plans without the consent of the Union.

⁵ We agree with the judge that the Respondent's unilateral changes are not lawful under the Board's decision in *The Courier-Journal*, 342 NLRB No. 113 (2004). Unlike the employer in that case, the Respondent has not demonstrated an established past practice of exercising its own discretion in changing its health insurance plan. Member Liebman dissented in *The Courier-Journal*, and does not consider the issue of practices under the expired contract in finding a violation in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Long Island Head Start Child Development Services, Inc., Patchogue, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All regular full-time and part-time teachers, teacher assistants, teacher aides, health coordinators, parent involvement coordinators, mental health specialists, disabilities services specialists, child care specialists, early childhood education specialists, nutrition specialists, health specialists, family/community development specialists, family advocates, early head start family educators, cooks and assistants, custodians, bus aides, food service/custodial aides, secretaries, clerk/typists/receptionists, lead nutrition specialists, lead parent involvement specialists and lead mental health specialists working twenty hours or more per week employed by Respondent but excluding all managers and supervisors, confidential employees, associate directors and assistant program managers.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with District Council 1707, Local 95, AFSCME, AFL-CIO, by unilaterally changing the health insurance carrier and plan for unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All regular full-time and part-time teachers, teacher assistants, teacher aides, health coordinators, parent involvement coordinators, mental health specialists, disabilities services specialists, child care specialists, early childhood education specialists, nutrition specialists, health specialists, family/community development specialists, family advocates, early head start family educators, cooks and assistants, custodians, bus aides, food service/custodial aides, secretaries, clerk/typists/receptionists, lead nutrition specialists, lead parent involvement specialists and lead mental health specialists working twenty hours or more per week employed by Respondent but excluding all managers and supervisors, confidential employees, associate directors and assistant program managers.

WE WILL, upon request, reinstate the health insurance plan as it existed prior to June 1, 2004, and WE WILL make whole unit employees for any losses they may have suffered as a result of our unlawful unilateral change, with interest.

LONG ISLAND HEAD START CHILD
DEVELOPMENT SERVICES, INC.

James Kearns, Esq. for the General Counsel.
J. Lawrence Paltrowitz, Esq. for the Respondent.
Thomas Murray, Esq. for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on December 21, 2004⁶. Upon a charge filed on June 4, a complaint was issued on August 27, alleging that Long Island Head Start Child Development Services, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed on January 24, 2005.

Upon the entire record of the case, including my observation of the demeanor of the witnesses⁷, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office and place of business located in Patchogue, NY, has been engaged in the provision of pre-school and social services. It has been admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that District Council 1707, Local 95, AFSCME, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

Respondent and the Union were parties to a collective-bargaining agreement (the Agreement) effective May 5, 1998 through May 4, 2001. Article 29 of the Agreement provided that:

All current practices, policies and procedures regarding personnel as set forth in the Agency's Personnel . . . Manual shall remain in effect except where modified by this Agreement.

Section 450 of Respondent's Personnel Manual provides:

The Agency reserves the right in its sole discretion to modify or terminate any or all benefit plan(s) permanently or temporarily at such time as it [d]eems appropriate without consent of the union or prior notices to any employee, retiree or beneficiary. . . .

Article 35 of the collective-bargaining agreement, under the caption, "Duration", provides, in pertinent part:

This Agreement shall be effective for a period of three (3) years commencing May 5, 1998 . . . through May 4, 2001. Thereafter, it shall automatically renew itself and continue in full force and effect from year to year unless written notice of election to terminate or modify any provision of this Agreement is given by one party, and received by the other party

....

The collective-bargaining agreement did not provide for health benefits. However, since 1995 Respondent has provided unit employees with health insurance using the Vytra Health Plan.

During 2003 and the early part of 2004 the parties negotiated a successor agreement to the 1998–2001 Agreement. On April 22, 2004 the parties entered into a Memorandum of Agreement, agreeing to a retroactive collective-bargaining agreement effective May 5, 2001 through May 4, 2004. Article 30 of the 2004 Memorandum of Agreement contains the identical provision as article 29 of the collective-bargaining agreement. In addition, article 36 of the Memorandum of Agreement contains a substantially identical provision to Article 35 of the Agreement.

After learning that Respondent desired to change its health insurance carrier, on March 25 Ann Marie Lunetta, the Union's staff representative, wrote to Respondent requesting bargaining over the proposed change in health plans. Respondent did not reply to the request.

On June 1 Respondent unilaterally changed its health insurance carrier to United Healthcare.

B. Discussion and Conclusions

Article 36 of the Memorandum of Agreement provides, in pertinent part:

This Agreement shall be in effect . . . through May 4, 2004. Thereafter, it shall automatically renew itself and continue in full force and effect from year to year unless written notice . . . is given by one party, and received by the other party. . . .

Respondent argues that because of this provision, after May 4, the collective-bargaining agreement automatically renewed itself. Therefore, Respondent argues, on June 1, when it unilaterally changed the health insurance carrier, the contract was in effect. Respondent further maintains, that since the agreement was in effect, article 30 was in effect. Article 30 provides that "all current practices, policies and procedures" as set forth in Respondent's personnel manual remain in effect. Section 450 of the manual contains a management rights clause which permits Respondent to modify or terminate employee benefit plans "without consent of the Union" and without prior notice to the employees. Thus, Respondent contends that on June 1 it had the right to change its health insurance carrier and plan without bargaining with the Union.

In *Blue Circle Cement Co.*, 319 NLRB 954 (1995), the Board stated, "a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract". There is no provision in the Memorandum of Agreement that the management-rights clause shall outlive the contract. In addition, as stated in *Ironton Publications*, 321 NLRB 1048 (1996), "the waiver of a union's right to bargain does not outlive the

¹ All dates refer to 2004 unless otherwise specified.

² Credibility resolutions have been based on the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

contract that contains it, absent some evidence of the parties' intentions to the contrary". See also *Buck Creek Coal*, 310 NLRB 1240 fn.1 (1993).

The Board has found unilateral changes to be lawful where the changes are pursuant to "established past practices". *The Courier-Journal*, 342 NLRB No. 113, slip op. at 2 (2004). Respondent had the same insurance carrier from 1995 until June 1, 2004. Indeed, when it wanted to change the contribution rate in 2000, it negotiated with the Union over a change in the rate. Respondent has not shown that it had an "established past practice" of unilaterally changing health insurance plans.

Finally, in support of its position, Respondent cites the case of *Pantry Restaurant*, 341 NLRB No. 30 (2004). In that case the Board held that the failure to make holiday and vacation payments without bargaining to impasse is a "unilateral change in a mandatory subject of bargaining". The Board held that the respondent violated Section 8(a)(1) and (5) of the Act by making a unilateral change.

Accordingly, I find that Respondent, by unilaterally changing its health insurance carrier and plan on June 1, 2004, without affording the Union the opportunity to bargain over the change, committed an unfair labor practice, in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The employees listed in Article 1 attached to the Memorandum of Agreement dated April 22, 2004 constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit.
5. By unilaterally changing the health insurance carrier and plan on June 1, 2004, without affording the Union the opportunity to bargain with respect to the change, Respondent has committed an unfair labor practice, in violation of Section 8(a)(1) and (5) of the Act.
6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having unilaterally changed its health insurance carrier and plan, I shall order that, upon request from the Union, it reinstate the health insurance program it had prior to June 1, 2004. In addition, I shall order that Respondent make whole the unit employees for any losses they may have suffered as a result of Respondent's change of health plans, in accordance with *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), and *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F. 2d 502 (6th Cir. 1971). Interest shall be

computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Long Island Head Start Child Development Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unilaterally changing the health insurance carrier and plan for its unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request by the Union, reinstate the health insurance carrier and the plan as it existed prior to June 1, 2004, and make whole unit employees for any losses they may have suffered as a result of the unilateral change, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facility in Patchogue, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, the Respondent has gone out of business or closed the facilities involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, reinstate the health insurance plan as it existed prior to June 1, 2004 and WE WILL make whole unit employees for any losses they may have suffered as a result of the unilateral change, with interest.

LONG ISLAND HEAD START CHILD DEVELOPMENT SERVICES, INC.